# **BUSINESS LAW SECTION**

# CORPORATIONS COMMITTEE COMMITTEE MEETING MINUTES FOR AUGUST 2, 2002

# Friday, August 2, 2002 Los Angeles

A regular meeting of the Corporations Committee (the "Committee") of the Business Law Section of the State Bar of California was held at the Marriott Hotel (Los Angeles Airport) on August 2, 2002. Attendance was as follows:

# MEMBERS PRESENT:

John C. Carpenter James K. Dyer, Jr. Teri Shugart Erickson Timothy J. Fitzpatrick James F. Fotenos Steven K. Hazen Mark T. Hiraide Carol K. Lucas B. Keith Martin Brian D. McAllister Cynthia Ribas Randall Brent Schai James R. Walther Daniel J. Weiser Neil J. Wertlieb Nancy Wojtas

### **MEMBERS ABSENT:**

Keith Paul Bishop David S. Caplan Nelson D. Crandall Bruce Dravis Eileen Lyon Ethna M. S. Piazza David M. Pike

### LIAISONS PRESENT:

Rosalind Tyson, Securities and Exchange Commission R. Todd Vlaanderen, California Secretary of State

# **GUESTS PRESENT:**

R. Bradbury Clark, Nonprofit and Unincorporated Organizations Committee Rich Mendoza, Law Student, Yale Law School

The minutes summarize discussions primarily in the order items were listed on the Agenda for the meeting previously circulated to members of the Committee, which is not necessarily the order in which the items were actually taken up at the meeting. The Committee did not take up those topics listed on the Agenda, which are not described in these minutes. In David Pike's absence, Jim Dyer agreed to take the minutes of the meeting.

#### I. ADMINISTRATIVE MATTERS.

A. Opening Remarks and Announcements. The meeting was called to order by Co-Chair Neil Wertlieb at approximately 9:30 a.m. Mr. Wertlieb opened the meeting by announcing the officers of the Committee for the upcoming term. The Co-Chairs will be Keith Bishop and Bruce Dravis, the Vice-Chair, Legislation, will be Nancy Wojtas, the Vice-Chair, Education, will be David Pike, the Vice-Chair, Communications, will be Brian McAllister, and the Secretary will be Jim Dyer. Mr. Wertlieb noted that there was a change in the schedule and the next meeting of the Committee will be held in Oakland on September 6, 2002. Mr. Wertlieb reminded the Committee that the Annual Meeting of the State Bar of California is scheduled for October 10-13 in Monterey, California. Next, Jim Walther informed the Committee that Brad Clark would present a one-hour presentation at the end of the meeting on nonprofit corporation law basics. Mr. Walther also distributed a copy of a securities update on the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley Act").

**B. Minutes of July 12, 2002 Meeting.** The minutes of the July 12, 2002 meeting previously circulated to the members were approved by the Committee as drafted. Lead by Jim Fotenos, the Committee expressed its appreciation for the exceptional work performed by David Pike in preparing the minutes of the meetings throughout the term.

#### II. LIAISONS' REPORTS AND DISCUSSION.

- A. Securities and Exchange Commission. Rosalind Tyson reported that all five Commissioners have been appointed. A brief background of the newly appointed Commissioners was provided. Ms. Tyson reported that the SEC was actively engaged in the process of preparing interpretive regulations under the Sarbanes-Oxley Act. Considerable time was spent discussing various portions of the Sarbanes-Oxley Act, including CEO/CFO certification requirements, corporate governance provisions, and the creation of the Public Company Accounting Oversight Board. In addition, Ms. Tyson provided an overview of the current enforcement philosophy of the SEC and discussed the status of certain rule proposals.
- **B. Department of Corporations.** Neil Wertlieb reported that Tim Le Bas could not attend the meeting, but sent Mr. Wertlieb an email requesting the Committee to consider providing input to the Department with respect to addressing Enron-type problems.
- C. BLS Executive Committee. Neil Wertlieb reported that the Executive Committee was meeting concurrently with the Corporations Committee. Suzanne Graeser had, however, provided Mr. Wertlieb with an email in advance of the meeting discussing legislative relations staff matters and stating that the Corporation Committee's legislative proposal relating to fax filings has been approved by the Executive Committee and submitted to the Legislative Committee. Once again, the Committee expressed its appreciation for the excellent service that has been provided to the Committee by Terry Miller, Principal Legislative Consultant, the State Bar of California.
- **D. Secretary of State.** Todd Vlaanderen provided a brief update concerning current events at the Office of the California Secretary of State. Mr. Vlaanderen provided a status report on the automation project and encouraged the Committee to provide input to the Secretary of State throughout the term of the project. The Secretary of State's position on SB 399 was discussed with members of the Committee.
- **E. Partnerships and LLC Committee.** Steve Hazen reported that the Partnerships and LLC Committee met the previous day. A major topic of discussion at the meeting was SB 399. Mr. Hazen also reported that major modifications to the Revised Limited Partnership Act are being considered at the national level. Mr. Hazen briefly discussed the status of "junction box" legislation. Mr. Hazen reported that The Guide to Organizing a California LLC is currently being published and that members of the Business Law Section will receive a complimentary copy. In addition, Mr. Hazen briefly discussed the June 28, 2002 Exposure Draft of a proposed Interpretation of the Financial Accounting Standards Board entitled Consolidation of Certain Special-Purpose Entities.
- **F. UCC Committee.** Jim Dyer reported that the UCC Committee met on July 30, 2002. Mr. Dyer reported that significant revisions to Articles 3 and 4 are being considered by ALI and NCCUSL. Mr. Dyer also reported that the Sample Forms of Deposit Account Control Agreements of the UCC Committee were recently published in the Business Law News (Volume XXII, Issue 2).
- **G. ADR Committee.** John Carpenter reported that the ADR Committee has not met since the last meeting of the Committee. Mr. Carpenter noted, however, that there had been a few important court decisions recently concerning arbitration, including Ferguson v. Countrywide Credit Industries, Inc., and Mitchell v. American Fair Credit Association, Inc.
- **H. Nonprofit and Unincorporated Organizations Committee.** Brad Clark reported that he did not expect a legislative proposal concerning unincorporated associations for the next couple of years.

#### III. PENDING LEGISLATION/AFFIRMATIVE LEGISLATIVE PROPOSALS.

**A. Report by Legislative Liaison.** Jim Fotenos reported on the current status of legislation of interest to the Committee:

# AB601 (Leach)

Signed by the Governor on July 13, 2002.

# AB1875 (Nakano and Correa)

Passed the Assembly and now with the Senate Appropriations Committee. Scheduled for hearing on August 5, 2002.

# AB2355 (Campbell)

Passed the Assembly. Scheduled to be heard by the Senate Judiciary Committee on August 6, 2002.

# AB2873 (Frammer and Correa)

Passed the Assembly and scheduled to be heard by the Senate Appropriations Committee on August 5, 2002.

# AB2969 (Florez)

Passed the Assembly and the Senate. Returned to the Assembly by the Governor's office.

# SB399 (Ackerman)

With the Senate Judiciary Committee.

# SB1472 (Romero)

Signed by the Governor on July 11, 2002.

# SB1473 (Machado)

Passed the Senate and now with the Assembly Appropriations Committee.

### SB1814 (Dunn)

Passed the Senate and now with the Senate B&P Committee.

Next, Mr. Fotenas discussed the Sarbanes-Oxley Act. An extensive discussion among the Committee followed. The primary areas of discussion related to the CEO/CFO certification requirements (including the method of delivery and applicable knowledge limitations), the duties of counsel, reporting requirements, and changes concerning audit committees. The NYSE corporate governance rules were also discussed.

**B. SB 399 - Corporate Conversions.** Co-Chair Wertlieb reported that there were two outstanding issues concerning SB399. The first issue was raised by the Secretary of State and relates to the filling fee that would be charged in connection with the conversion, and the second issue was raised by the Franchise Tax Board and relates to the California state tax consequences of the conversion. These issues were described in communications from the Office of the Secretary of State and the Franchise Tax Board that were distributed to the members of the Committee prior to the meeting. The Committee believed that an amendment to SB 399 that specified that a \$150 filling fee would be charged for conversions would satisfactorily address the filling fee issue. With respect to the issue of taxation, the Franchise Tax Board proposed that SB 399 be amended to provide that the converted entity would be the same entity as the converting entity for all purposes other than income and franchise tax. Mr. Wertlieb stated that it was his understanding that the change was considered necessary by the Franchise Tax Board to ensure that date of the conversion would be the last day of the tax year for the converting entity and the

first day of the tax year for the converted entity. Mr. Hazen noted that the Partnerships and LLC Committee had discussed this proposal at their meeting the day before and shared that committee's comments on the issue. The Committee suggested that, although the proposal of the Franchise Tax Board seems reasonable on its face, experienced tax counsel should carefully analyze the proposal before it is incorporated into SB399.

# IV. POTENTIAL AFFIRMATIVE LEGISLATIVE PROPOSALS

- **A. Secretary of State Fax Filings.** Neil Wertlieb reported that Bruce Dravis provided an email concerning the status of the Secretary of State fax filings legislative proposal. The proposal has been approved by the Executive Committee and sent to the Legislative Committee for consideration.
- **B. 25118(b) Definition of Aggregate Evidences of Indebtedness.** Dan Weiser distributed a memorandum on the subject of 25118(b) and discussed various options for amendment, including a possible exemption for all business entity borrowers. Members of the Committee were asked to review Mr. Weiser's memorandum and provide feedback at the next meeting of the Committee.

#### V. WEBSITE PROJECTS

**A. Website Update.** Brian McAllister reported that he is working with David Caplan to ensure a smooth transition of the website into the next term.

#### VI. OTHER PROJECTS

- **A. Opinions Project.** Nelson Crandall was not able to attend the meeting. The Committee agreed to make the opinions project a high priority for the next meeting. Members of the Committee were requested to be prepared to discuss any questions they may have concerning the opinions project at the next meeting.
- **B. Educational Activities.** The Committee is sponsoring two programs at the upcoming Annual Meeting of the State Bar of California. The programs are Choice of Entity Basics (Erickson, Dyer, and Vlaanderen) and Fiduciary Duties of Directors (Weiser, Caplan, and Schai). Materials are due by August 15, 2002. Cynthia Ribas is submitting an article to the Business Law News that will compare California and Delaware corporations law. Neil Wertlieb noted that the Committee must submit at least the topic for its program in the Winter Educational Institute by August 29, 2002. Potential topics were discussed by the Committee, including the Sarbanes-Oxley Act and Nevada law for California practitioners.
- **C. Guide to Organizing California Corporations.** Eileen Lyon was not able to attend the meeting and Keith Martin reported that this was her last meeting on the Committee. The history and purpose of this project was discussed. Co-Chairs Wertlieb and Walther will discuss the project with the Executive Committee, and Keith Martin will work with Eileen Lyon to transition the project to the members of the Committee next term.
- **D. Recruiting New Members.** Randall Schai reported that the Committee will lose three people at the end of this term and eight people at the end of next term. The importance of recruiting for the Committee was emphasized and should be carefully considered next year. Neil Wertlieb reported that he, Jim Walther, Keith Bishop and Bruce Dravis have recommended five applicants to the Executive Committee for appointment to the Corporations Committee.

#### **VII. NEW BUSINESS**

**A. CLE Presentation on Non-Profits.** Brad Clark presented an overview of nonprofit corporation law in California. After discussing the definition of a nonprofit corporation, Mr. Clark provided a brief history of Nonprofit Corporations Law and discussed the following three basic types of nonprofit corporations: (i) nonprofit public benefit corporations, (ii) nonprofit religious corporations, and (iii) nonprofit mutual benefit corporations. Noting that the Nonprofit Corporations Law is

similar in many respects to the General Corporations Law, Mr. Clark discussed some of the significant differences between the two, including organizational matters, management, membership, voting, and distributions.

**B. Practice Issues.** The Committee discussed certain issues concerning prior years' financial statements audited by Arthur Anderson.

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**Corporation Committee Meeting Minutes** 

